ARTICLE 5

BEGINNING AND END OF APPLICATION

❖ Text of the provision*

(1) The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

(2) Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

❖ Reservations or declarations

None

Contents

* Paragraph numbers have been added for ease of reference.

https://doi.org/10.1017/9781108979320.009 Published online by Cambridge University Press

A. Introduction

1093 Article 5 sets out the temporal scope of application of the Third Convention. It provides that the Convention applies to persons referred to in Article 4 from the time they fall into the power of the enemy until their final release and repatriation. Like other articles in the Geneva Conventions, it has been drafted in broad terms to ensure protection is granted in all the circumstances in which it may possibly be needed. The Convention applies based on the facts on the ground and does not hinge on formalities regarding the beginning or end of a conflict.[1] Alongside the articles on the non-renunciation of rights and special agreements,[2] Article 5 precludes a Party to a conflict from denying prisoners of war the protection of the Convention for as long as they are in its power.

1094 Article 5 also specifies that in case of doubt regarding the status of persons who have committed a belligerent act and fall into the hands of the enemy, such persons enjoy the protection of the Convention until their status has been determined by a competent tribunal. This provision implicitly acknowledges that determining prisoner-of-war status may not always be straightforward and sets out what must be done in such a scenario. Article 45 of Additional Protocol I 'reaffirms, supplements, clarifies and expands upon' Article 5(2).[3]

B. Historical background

1095 The inclusion of a provision on the applicability of the Convention is not without precedent. Article 1 of the 1929 Geneva Convention on Prisoners of War provided that the Convention applied to all persons referred to in Articles 1, 2 and 3 of the 1907 Hague Regulations 'who are captured by the enemy' and to all persons 'belonging to the armed forces of belligerents who are captured by the enemy in the course of operations of maritime or aerial war, subject to such exceptions (derogations) as the conditions of such capture render inevitable'.

1096 While this provision rendered the 1929 Convention applicable upon capture, the experiences of the Second World War demonstrated that there was nevertheless sufficient ambiguity in its temporal scope for certain groups of combatants to be inadequately protected. In its report to the Preliminary Conference of National Societies in 1946, the ICRC gave examples of soldiers who were denied prisoner-of-war status during the Second World War, including prisoners of war reclassified as 'civilian workers' following the German occupation of Poland and France, and members of Axis forces captured after the end of

[1] See also the commentary on Article 5 of the First Convention, para. 949.
[2] See common Article 6 (Article 7 in the Fourth Convention) and common Article 7 (Article 8 in the Fourth Convention), respectively.
[3] Bothe/Partsch/Solf, p. 295.

hostilities who were designated 'surrendered enemy personnel'.[4] In both instances, the prisoners were therefore denied the protection of the 1929 Convention.

1097 Accordingly, Article 5 was drafted to both clarify and expand the temporal scope of prisoner-of-war protection. It was agreed that the protections of the Convention would apply from the time persons referred to in Article 4 fall into the power of the enemy. In addition, the few exceptions in the 1929 Convention (e.g. allowing for derogations 'as the conditions of such capture render inevitable' for prisoners captured during operations of maritime or aerial war[5]) were dispensed with.[6]

1098 Article 5 further specifies that protection is due until the prisoners' final release and repatriation. This clause was designed to counter the practice by some States of discharging prisoners of war and then immediately apprehending them again and interning them as 'civilian detainees'.[7]

1099 Lastly, a new mechanism was introduced to address circumstances where prisoner-of-war status is unclear. Article 5(2) contains the requirement that if a person falls into the hands of the enemy having committed a belligerent act, and the person's status is in doubt, that status must be determined by a 'competent tribunal'. This was to ensure that 'in the future no person whose right to be treated as belonging to one of the categories of Article [4] is not immediately clear, shall be deprived of the protection of the Convention without a careful examination of his case'.[8]

C. Paragraph 1: Application of the Convention

1. *Beginning of application: 'From the time they fall into the power of the enemy'*

1100 The Convention begins to apply from the moment a person belonging to any of the categories listed in Article 4 falls into the power of the enemy.[9] At the 1947 Conference of Government Experts, delegations agreed that 'on the whole' the Convention should apply 'in principle' as soon as prisoners of war fall into the power of the enemy; however, they also remarked that in practice a Detaining Power might experience some difficulties in applying the

[4] *Reports and Documents submitted by the ICRC to the Preliminary Conference of National Societies of 1946*, Vol. II, pp. 4–5.
[5] Geneva Convention on Prisoners of War (1929), Article 1.
[6] *Report of the Conference of Government Experts of 1947*, p. 114.
[7] *Reports and Documents submitted by the ICRC to the Preliminary Conference of National Societies of 1946*, Vol. II, p. 5.
[8] *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 563.
[9] For a discussion of the meaning of the phrase 'fallen into the power of the enemy', see the commentary on Article 4, section C.1.

https://doi.org/10.1017/9781108979320.009 Published online by Cambridge University Press

Convention in all its details from the outset.[10] An option that was considered was to create two categories of provisions: the first category would consist of the fundamental principles of the Convention, which would be applicable immediately upon capture; the second would consist of provisions that would become applicable as soon as circumstances allowed, which some participants thought should correspond to the moment when prisoners were registered in a camp.[11] Two additional suggestions were put forward to set down limiting conditions for possible exceptions.[12] The government experts ultimately concluded that it was preferable to 'maintain solely the principle of strict application of the Convention immediately on capture, and to refrain from any explicit mention of possible exceptions'.[13]

1101 A person may fall into the hands of the enemy for the purpose of Article 5 at any time during an armed conflict.[14] For example, a person included in one of the categories listed in Article 4 who falls into the hands of the enemy following a ceasefire, but prior to the cessation of active hostilities, will be protected by the Third Convention. Likewise, the capture by a State of members of the armed forces of another State may constitute the start of an international armed conflict, triggering the application of the Third Convention from then on.

2. The end of application: 'Until their final release and repatriation'

1102 Just as the beginning of prisoner-of-war status was designed to exclude exceptions, its end is set out in similarly clear terms to ensure that prisoners' protected status continues until it is no longer necessary, namely until their final release and repatriation.

1103 Recognizing the significant practical challenges faced by Detaining Powers at the close of the Second World War, some delegations in 1947 had suggested allowing for derogations in the period between the end of hostilities and the final release of the prisoners of war. However, the majority rejected this proposal, considering it unacceptable that prisoners of war could be treated less well after the end of active hostilities than before.[15]

1104 At the 1946 Preliminary Conference of National Societies, concern was expressed regarding the practice of some Second World War belligerents of

[10] *Report of the Conference of Government Experts of 1947*, p. 114.
[11] *Ibid.*
[12] The proposals were: 'the first, that any [Detaining Power] which may be unable, for purely material reasons[,] to apply all the stipulations of the Convention should be obliged to notify the fact to the ICRC; the second, that exceptions may only be made in cases of absolute necessity'; *ibid.*
[13] *Ibid.*
[14] For a discussion of the temporal scope of 'international armed conflicts', see the commentary on Article 2, paras 269–277 and section D.2.c.
[15] *Report of the Conference of Government Experts of 1947*, p. 115.

removing prisoner-of-war status from certain prisoners following the capitulation of their home country or through the conclusion of bilateral agreements.[16] To avoid this, the ICRC suggested that the Convention ensure that there was 'no change in its application until the complete and final liberation' of the prisoners.[17]

1105 The inclusion of the word 'final' was intended to serve this purpose. Prisoners of war remain protected by the Convention for as long as they are in enemy hands, even if hostilities have ceased and potentially even long after the end of the conflict. They maintain prisoner-of-war status until such time as they have been reinstated to the situation they were in before they fell into the power of the enemy.[18] The reference to 'final' release and repatriation also serves to prevent the Detaining Power from returning 'released' prisoners of war to captivity under some other guise.[19] Persons who have been received by a neutral Power also remain under the protection of the Third Convention until their final release and repatriation.[20] The obligations of the Convention also continue to apply, where relevant, if the Detaining Power releases a prisoner on parole or promise.[21]

1106 There may be a small number of cases in which a prisoner of war refuses to be repatriated and is given another protective status under international law, ending their prisoner-of-war status.[22]

1107 Articles 109–119 regulate the release and repatriation of prisoners of war.

3. *Those no longer in the power of the enemy*

1108 Article 5(1) deals with the end of application of the Convention for prisoners of war following their final release and repatriation. It does not, however, expressly address the end of application of the Convention for persons referred to in Article 4 who were once in the power of the enemy but no longer are, even though they were not released and repatriated. Such a situation might arise, for example, where a prisoner-of-war camp is successfully taken over by enemy forces and the prisoners are liberated, or where a prisoner of war escapes.[23] In such circumstances, the Convention also ceases to apply to those persons.

[16] *Reports and Documents submitted by the ICRC to the Preliminary Conference of National Societies of 1946*, Vol. II, pp. 4–5; Gillet, pp. 125–126.
[17] *Report of the Conference of Government Experts of 1947*, p. 115.
[18] Grignon, p. 374; see also Wilhelm, p. 27.
[19] This has also been addressed in part by Article 4B.
[20] In relation to a neutral Power's obligation to release and repatriate any persons it interns, see Article 4B(2) and the commentaries on Article 110, section E, and on Article 111, paras 4336 and 4343.
[21] See the commentary on Article 21.
[22] See the commentary on Article 118, para. 4471.
[23] For a discussion of the rules regulating the escape of prisoners of war, see the commentaries on Article 42, section F, and on Article 91.

4. *Effect of reclassification of an international armed conflict to a non-international armed conflict*

1109 A situation that was not envisaged during the drafting of the Third Convention is one in which the legal classification of an armed conflict changes from international to non-international owing to an evolution of facts on the ground. In such a situation, an international armed conflict becomes non-international because one of the fighting forces involved no longer represents a State but has become a non-State Party, even though hostilities continue. Such situations do not often arise, but when they do, they raise important legal and practical questions.[24]

1110 Where this occurs, and in light of the continuing armed confrontations, if either Party holds prisoners of war, it is unlikely to be willing to release and repatriate them at the moment when the classification of the conflict changes because of an expectation that they may rejoin hostilities in the now non-international armed conflict. Questions thus arise regarding the legal basis for the possible continued internment of the prisoners and for their treatment. Different interpretations are possible.

1111 Under one approach, the relevant Parties are not obliged to release and repatriate the prisoners of war. Pursuant to Article 118(1), this obligation is activated by the 'cessation of active hostilities'; where hostilities between the same actors continue,[25] even if the legal classification of the armed conflict has changed, Article 118(1) would thus not be triggered.[26] The Third Convention remains the legal basis for their internment, and, pursuant to Article 5(1), the prisoners remain protected by the Convention until their final release and repatriation. This includes, among other things, the right of the Protecting Powers and the ICRC to undertake visits to places of internment.[27] Persons who fall into the power of the enemy after the classification of the conflict has changed, however, are not eligible for prisoner-of-war status and would not be protected by the Third Convention. Another legal basis for the internment of those persons is required.[28]

[24] See e.g. ICRC, 'Iraq post 28 June 2004: protecting persons deprived of freedom remains a priority' (web article), 5 August 2004. United Kingdom, Select Committee on International Development, Letter from the Clerk of the Committee to Philip Spoerri, Legal Adviser, International Committee of the Red Cross and reply, Appendices to the Minutes of Evidence, 20 December 2002.

[25] The same assessment would apply when the original Parties are joined by additional Parties or groups.

[26] See e.g. United States, Supreme Court, *Hamdi case*, Judgment, 2004; Court of Appeal for the District of Columbia, *Al-Alwi case*, Judgment, 2018; and Supreme Court, *Al-Alwi case*, Judgment, 2019. See also Kubo Mačák, *Internationalized Armed Conflicts in International Law*, Oxford University Press, 2018, pp. 109–110.

[27] Article 126.

[28] For a discussion of detention outside a criminal process during a non-international armed conflict, see the commentary on Article 3, section H.

1112 Under another approach, the hostilities related to the international armed conflict and the non-international armed conflict are considered to be distinct. Even if in fact armed confrontations between the same actors continue, the legal classification of the conflict has changed, and the legal framework should be correspondingly adapted. Pursuant to this view, active hostilities in the international armed conflict are deemed to have ceased, thus triggering the Article 118(1) obligation to release and repatriate prisoners of war. With no international armed conflict between the Parties, the Third Convention no longer provides a legal basis for the further internment of the prisoners.[29] If a Party believes that it must continue holding them for imperative reasons of security, another legal basis for their internment is required[30] and an individualized assessment of the security threat posed by each prisoner should be undertaken.[31]

1113 In the latter scenario, a question remains about which legal framework governs the protection of such prisoners, with two possible interpretations. Arguably, these persons are now protected by common Article 3 (and Additional Protocol II, as the case may be), customary international humanitarian law in non-international armed conflicts, applicable international human rights law and the domestic law of the detaining Party.[32] The legal regime applicable to these prisoners would thus be the same as that applicable to persons who fall into the power of the enemy after the change of the classification of the conflict. According to a related but alternative view, a strict reading of Article 5(1) leads to the conclusion that, even though a new legal basis must be sought for the prisoners' continued internment, they continue to benefit from the protections of the Third Convention for as long as they are not in fact released and repatriated.[33]

D. Paragraph 2: Determination of status by a competent tribunal

1114 Article 5(2) deals with situations in which the status of a person who has committed a belligerent act and has fallen into the power of the enemy is in doubt. In such cases, the Detaining Power must have their status determined by a competent tribunal and it must ensure that they enjoy the protection of the Third Convention until a decision is rendered.[34] This is an important provision as the consequences of a possible denial of prisoner-of-war status are significant: a person could be deprived of combatant immunity for lawful

[29] See Sassòli, p. 1048, para. 24.
[30] See the commentary on Article 3, section H.
[31] See Sassòli, p. 1048, para. 24.
[32] In relation to the 2003–2011 Iraq War, see Dörmann/Colassis, p. 328.
[33] Sassòli, p. 1048, para. 24.
[34] For the purposes of targeting, however, where there is doubt, civilian status is to be presumed; see Additional Protocol I, Article 50(1).

acts of war, i.e. be subject to criminal prosecution under the domestic law of the Detaining Power for the mere fact of having participated in hostilities.[35] Conversely, prisoners of war can be held until the end of active hostilities, which may be a long time.

1115 If a competent tribunal determines that a person belongs to any of the categories listed in Article 4, prisoner-of-war status must be granted, and that person continues to enjoy the protection of the Convention until their final release and repatriation. If it is found that a person is not eligible for such status, they will be protected under the Fourth Convention provided the nationality criterion of Article 4 of that Convention is fulfilled.[36] In all other cases, the fundamental guarantees provisions of Article 75 of Additional Protocol I, as applicable, as well as of customary international humanitarian law, will govern.

1. When is a determination by a competent tribunal required?

a. 'Having committed a belligerent act'

1116 Article 5(2) explicitly applies only to persons who have committed a belligerent act. The inclusion of this condition is an indication of the circumstances in which an interned prisoner is most at risk of punishment for having participated in the hostilities.[37]

1117 Committing a belligerent act, however, is not a precondition for prisoner-of-war status.[38] There may be circumstances where a person's status is in doubt and that person has not committed a belligerent act, for example in the case of a civilian authorized to accompany the armed forces, or a person who claims to belong to the medical or religious personnel of the armed forces and displays

[35] See also Risius, p. 295. See also Introduction, para. 20, and the commentary on Article 85, para. 3634.

[36] Persons without combatant status who have participated directly in hostilities are sometimes referred to as 'unlawful combatants'; see e.g. Rosas, pp. 305 and 311. For different views on the consequences of being a so-called 'unlawful combatant' or 'unprivileged belligerent', see e.g. Knut Dörmann, 'The legal situation of "unlawful/unprivileged combatants"', *International Review of the Red Cross*, Vol. 85, No. 849, March 2003, pp. 45–74; Yutaka Arai-Takahashi, 'Unprivileged (unlawful) belligerents captured on a battlefield and the Geneva Conventions', *Israel Yearbook on Human Rights*, Vol. 48, 2018, pp. 63–103; Yoram Dinstein, 'The Distinction between Unlawful Combatants and War Criminals', in Yoram Dinstein and Mala Tabory (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Martinus Nijhoff Publishers, Dordrecht, 1989, pp. 103–116, at 112; Richard R. Baxter, 'So-called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs', *British Yearbook of International Law*, Vol. 28, 1951, pp. 323–345, at 328–329 and 343–345; Knut Ipsen, 'Combatants and Non-Combatants', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd edition, Oxford University Press, 2013, pp. 79–113, at 82–84; Henri Meyrowitz, 'Le statut des saboteurs dans le droit de la guerre', *Revue de droit pénal militaire et de droit de la guerre*, Vol. 5, 1966, pp. 121–176, at 159; and United States, *Law of War Manual*, 2016, pp. 160–164, para. 4.19.

[37] Naqvi, pp. 579–580.

[38] See also Rosas, p. 300.

the distinctive emblem on an armlet but fails to produce an identity card.[39] All persons who have not committed belligerent acts must be presumed to be civilians when they have fallen into the hands of the enemy.[40] In case of doubt, it will nevertheless be necessary to determine their true status.

1118 In practice, some States have employed tribunals to resolve the status of persons who have not committed belligerent acts.[41] If the Detaining Power decides not to use a competent tribunal in such cases, it would need an alternative procedure to make an effective, reliable and timely determination of the person's status.[42]

b. 'Should any doubt arise'

1119 Where there is a doubt whether a person in the hands of the enemy is entitled to prisoner-of-war status, such status must be determined by a competent tribunal. Doubt may arise when it is not clear whether the person in fact belongs to any of the categories enumerated in Article 4. Examples include persons who accompany the armed forces and have lost their identity cards; persons engaged in belligerent acts without wearing a uniform or fixed distinctive sign in zones of active hostilities; persons suspected of being spies; persons working as private contractors; and persons suspected of being mercenaries.[43] Doubt could also arise where there is a practice of issuing military-like uniforms to civilian public servants or government officials. Questions relating to

[39] See the commentary on Article 28 of the First Convention, paras 2171–2173.

[40] Sri Lanka, *Military Manual*, 2003, para. 607; Turkey, *LOAC Manual*, 2001, chapter 6-1, pp. 39–40; and Sassòli, p. 262.

[41] See e.g. United States, *Operational Law Handbook*, 2017, pp. 17–18, which recalls, p. 18, fn. 81, that during the First Gulf War (1990–1991), a number of persons who were initially thought to be prisoners of war 'were actually displaced civilians' who 'had taken no hostile action against Coalition Forces'; tribunals were conducted to verify their status. The Handbook notes, however, '[w]hether the tribunals were necessary as a matter of law is open to debate – the civilians had not "committed a belligerent act," nor was their status "in doubt"'. During the same conflict, the United Kingdom convened a 'board of inquiry' to settle the status of a number of Iraqis interned as prisoners of war in the United Kingdom who contested that status and who were not alleged to have committed belligerent acts; Risius, pp. 295–297, and Maia/Kolb/Scalia, pp. 74–75. In 1989, the United States used the same procedure, namely a 'de facto Article 5 tribunal', to determine the status of all its detainees whose status was unclear; see Frederic L. Borch, 'Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti', Office of the Judge Advocate General and Center of Military History United States Army, Washington, D.C., 2001, pp. 103–104. See also Switzerland, *Basic Military Manual*, 1987, examples relating to Article 66.

[42] See e.g. United States, *Law of War Manual*, 2016, pp. 180–183, para. 4.27, which states that 'an administrative process may be appropriate to address status questions besides entitlement to POW status or treatment, such as whether detainees are retained personnel or civilians. [Department of Defense] practice has been to use Article 5 tribunals or similar administrative tribunals to address those issues.'

[43] See e.g. Belgium, *Law of Armed Conflict Training Manual*, 2009, Part IV, para. 6; Netherlands, *Military Manual*, 2005, para. 0324; Switzerland, *Basic Military Manual*, 1987, examples relating to Article 66. See also Tougas, pp. 944–947, and the commentary on Article 4, sections D.3, D.4, D.6, E.2.d and paras 1050–1051.

the fulfilment of the criteria of Article 4A(2) for irregular armed forces can also be a source of doubt.

1120 Doubt about a person's status will likewise arise when a person or the Power on which they depend asserts prisoner-of-war status and this is not immediately accepted by the Detaining Power.[44] The fact that a person does not claim prisoner-of-war status, however, cannot justify a denial of such status.[45] For the provision to be effective, the question whether doubt exists should not be interpreted narrowly and does not depend solely on the subjective belief of the Detaining Power. Otherwise, there is a risk that a Detaining Power will simply assert that it has 'no doubt' regarding the status of an individual and deny them prisoner-of-war status regardless of the circumstances.[46] This would render Article 5(2) meaningless and without effect. Rather, a determination must be made on a case-by-case basis with a proper assessment of the facts and in good faith.[47] This provision recognizes the special vulnerability of persons in the power of the enemy and aims to ensure that when their status is uncertain, it must be determined by a competent tribunal.

1121 A competent tribunal may also be engaged when a person asserts that they are not a prisoner of war, a situation not addressed in the Convention. It can happen that a Detaining Power considers a person to be a prisoner of war and that person, or the Power on which they depend, contests it. Article 5(2) is premised on the assumption that persons who have committed a belligerent act would seek to enjoy the benefit of prisoner-of-war status.[48] However, a Detaining Power may intern prisoners of war until the end of active hostilities to prevent them from rejoining their armed forces, meaning that internment may last a long time. A person who asserts that they do not fall under any of the categories of Article 4 and who has not committed a belligerent act prior to falling into enemy hands may thus seek to contest their prisoner-of-war status and concomitant internment. A competent tribunal should assess such a claim in the same way as it would a claim to prisoner-of-war status.[49]

[44] See e.g. Australia, *Manual of the Law of Armed Conflict*, 2006, para. 10.15; United Kingdom, *Joint Doctrine Captured Persons*, 2015, Annex 1A, para. 1A1, and *Manual of the Law of Armed Conflict*, 2004, p. 330, para. 12.72; and United States, *Directive on Determination of Eligibility of Prisoners of War*, 1968, para. 5(f), and *Army Regulation on Enemy Prisoners, Retained Personnel, Civilian Internees and Other Detainees*, 1997, para. 1-6(b). Switzerland's *Basic Military Manual*, 1987, Article 66, states that all prisoners should benefit from prisoner-of-war status until a determination can be made, if a claim to such status is made by the prisoner individually, by the Party on which they depend or by a Protecting Power invoking the status on their behalf.

[45] Bothe/Partsch/Solf, p. 295.

[46] See e.g. Sassòli, p. 263, and Maia/Kolb/Scalia, p. 69.

[47] David, p. 610; Maia/Kolb/Scalia, pp. 68–69.

[48] Hill-Cawthorne, p. 57.

[49] See Tougas, p. 954, and Sassòli, p. 263. For an example of an Article 5 tribunal being used to determine the status of persons objecting to their classification as prisoners of war, see Hampson, pp. 515–516.

2. 'The protection of the present Convention'

1122 Article 5(2) establishes a default position to ensure that if there is any doubt about the status of a person who has committed a belligerent act and who has fallen into the hands of the enemy, they must receive the protection of the Convention until a status determination is made.[50] Put simply, protection must come first, and only then a status determination. The person must enjoy all the guarantees of the Convention as well as the benefits of prisoner-of-war status until their status has been determined by a competent tribunal.[51] In this context, it is important to note that the protection referred to includes immunity for lawful acts of war. Article 5(2) was expressly drafted to ensure that there is no gap in protection and to remove any incentive to delay a decision on status.[52]

3. A competent tribunal

1123 There is little guidance as to what is meant by a 'competent tribunal' under Article 5. The term 'competent tribunal' was agreed on during the 1949 Diplomatic Conference in preference to 'responsible authority' or 'military tribunal'. One delegation argued against the notion that military tribunals could decide the status of individuals, primarily out of concern that they may lack impartiality.[53] This view was not adopted; the agreed term 'competent tribunal' was considered to include 'military tribunals'.[54]

1124 Some delegations at the Conference argued that only a 'regular court' should be authorized to decide on the status of individuals. However, the majority, 'in spite of its sympathy with this point of view', rejected this approach.[55] In the end, the broad formulation 'competent tribunal' was agreed, to allow for hearings to be conducted by military or civilian bodies.[56] The term 'competent tribunal' was chosen to encompass different types of assessment proceedings, without being prescriptive. The requirement that a competent tribunal make

[50] See e.g. Australia, *Manual of the Law of Armed Conflict*, 2006, para. 10.15; Sierra Leone, *Instructor Manual*, 2007, p. 36; United Kingdom, *Joint Doctrine Captured Persons*, 2015, p. 1-11, para. 130; and United States, *Army Regulation on Enemy Prisoners, Retained Personnel, Civilian Internees and Other Detainees*, 1997, p. 2, section 1-5(a)(2) ('All persons taken into custody by US forces will be provided with the protections of the [Third Convention] until some other legal status is determined by competent authority.').

[51] See also Additional Protocol I, Article 45.

[52] Maia/Kolb/Scalia, p. 67.

[53] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 270 (USSR). The Russian Federation's *Regulations on the Application of IHL*, 2001, p. 6, requires that the status be clarified by a court of justice.

[54] *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 270–272.

[55] *Ibid.* Vol. II-A, p. 563. As a matter of practice, some States require that such decisions be made by a judicial authority; see e.g. Netherlands, *Military Manual*, 2005, para. 0325.

[56] *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 270–272.

the determination was intended to rule out the possibility of 'arbitrary decisions [being made] by a local commander, who may be of a very low rank'.[57]

1125 The tribunal referred to is one established by or in accordance with domestic law or regulations. The Detaining Power should guarantee the tribunal's competence, composition and procedure[58] and ensure that its procedure enables individual status determinations.

1126 In practice, the status of individuals has been decided by a variety of mechanisms, such as military tribunals or courts[59] or boards of inquiry,[60] as well as civilian courts in specific circumstances.[61] The US Army, for example, issued a directive during the 1955–75 Vietnam War requiring that Article 5 tribunals consist of three or more officers, at least one of which was to be a judge advocate or military lawyer familiar with the Geneva Conventions.[62] Some States describe the nature of the competent tribunal in their military manuals. The Netherlands has specified that the determination must be made by a judicial authority, namely the military division of the District Court of Arnhem, or by an established mobile court.[63] Denmark has opined that the tribunal is 'more in the nature of an administrative body' and that in practice it will often be a military tribunal.[64] The United Kingdom has stated that '[a] UK military tribunal will normally determine status'.[65] Whatever type of mechanism a State decides to use, it is important that plans and preparations for the determinations required by Article 5 are made already in peacetime.

1127 The procedural guarantees applicable to status-determination proceedings are not regulated by international humanitarian law but are a matter of domestic law or regulations. The determination should be made within a reasonable

[57] *Ibid.* p. 270. See also H.W. William Caming, 'Nuremberg Trials: Partisans, Hostages and Reprisals', *Judge Advocate Journal*, Vol. 4, 1950, pp. 16–22, at 19, in relation to the infamous Barbarossa Jurisdiction Order issued on 13 May 1941, which directed that 'partisan suspects' be brought before an officer who would determine whether they were to be shot. This was considered during the Nuremberg Trials as 'patently criminal' as it 'permitted the immediate killing of alleged partisans and "partisan suspects" without investigation and at the discretion of a junior officer'; *ibid.*

[58] Some military manuals expressly state that regulations for the competent tribunal must be drafted and published; see e.g. Peru, *IHL Manual*, 2004, para. 54; Sri Lanka, *Military Manual*, 2003, para. 1630; and Turkey, *LOAC Manual*, 2001, chapter 7-7.

[59] See e.g. Israel, Military Court at Ramallah, *Kassem case*, Judgment, 1969.

[60] See Risius, pp. 295–297.

[61] Civilian courts have considered this question where defendants claim immunity from prosecution based on alleged prisoner-of-war status. See e.g. Israel, Supreme Court, *Srur case*, Appeal Decision, 2006, and Tel-Aviv District Court, *Barghouti case*, Decision, 2003; Singapore, Federal Court, *Krofan case*, Decision, 1966; and United States, District Court for the Southern District of Florida, *Noriega case*, Post-Sentencing Recommendation, 1992, and District Court for the Eastern District of Virginia (Alexandria Division), *Lindh case*, Decision on Motion to Dismiss, 2002.

[62] United States, *Directive No. 20-5*, 1968, Annex A, para. 3. See also Levie, pp. 56–59.

[63] Netherlands, *Military Manual*, 2005, para. 0325.

[64] Denmark, *Military Manual*, 2016, p. 480, para. 5.1.2.2.

[65] United Kingdom, *Joint Doctrine Captured Persons*, 2015, Annex 1A, para. 1A2.

time frame[66] and conducted on a case-by-case basis so as to prevent, for example, the blanket exclusion of units or groups.[67]

1128 In practice, some States provide procedural guarantees for tribunal hearings which resemble judicial proceedings, for instance: the right to present the facts with the assistance of legal counsel or an 'assisting member'; the right not to testify against oneself; the right to an interpreter; the right to present evidence; and the right of review.[68] Where determinations are made away from the combat zone, it would seem that a greater degree of procedural protection can be given. The flexibility built into Article 5 recognizes the challenges that may exist when making decisions in or near a combat zone, immediately after capture.[69]

1129 To make the identification and determination of a captured person's status easier, some States require a report to be made detailing the circumstances of capture, including, for example, whether the person was armed, what the person was wearing and what identity or other documents the person was carrying.[70]

1130 In most cases covered by Article 5(2), it will be the Detaining Power that is in doubt as to whether a person claiming prisoner-of-war status is entitled to that status. The 'general spirit' of Article 5(2),[71] coupled with the limited resources and inherently vulnerable position of a person in enemy hands, leads to the conclusion that the task of establishing that a person is not entitled to prisoner-of-war status should rest with the Detaining Power.[72] As discussed in the

[66] As noted during the 1971–1977 Diplomatic Conference, it is at the moment of capture that prisoners are exposed to the gravest danger; see Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, para. 1741.

[67] As stated in New Zealand's *Military Manual*, 2019, Vol. 4, p. 12-34, para. 12.9.6, '[p]ersons are not to be disqualified from PW status on the basis of a blanket determination'. See also Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, para. 1745.

[68] See e.g. Canada, *Prisoner-of-War Status Determination Regulations*, 1991, Regulations 10, 11, 13 and 17; and United States, *Directive No. 20-5*, 1968, Annex A, and *Army Regulation on Enemy Prisoners, Retained Personnel, Civilian Internees and Other Detainees*, 1997, para. 1-6. In the ICRC's experience, conducting a review of status in a language the detainee does not understand, in the absence of a translator, may result in the detainee being unable to participate meaningfully in the proceedings and may ultimately be unaware of the decision made or the reasons for it.

[69] The practical difficulties associated with making determinations in the context of the international armed conflict between the US-led coalition and Iraq that started in 2003 are described in Mercer, pp. 151–155.

[70] See e.g. Canada, *Prisoner-of-War Status Determination Regulations*, 1991, Regulation 7; Peru, *IHL Manual*, 2004, para. 54(c); Sri Lanka, *Military Manual*, 2003, para. 1631; and Turkey, *LOAC Manual*, 2001, chapter 7-7.

[71] Rosas, p. 410.

[72] *Ibid.* and Tougas, p. 952. For a discussion of the burden of proof in a criminal trial where the accused had claimed to be entitled to prisoner-of-war treatment, see Richard R. Baxter, 'The Privy Council on the Qualifications of Belligerents', *American Journal of International Law*, Vol. 63, No. 2, April 1969, pp. 290–296, at 292–294; Levie, p. 56, fn. 202; and Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd edition, Cambridge University Press, 2016, p. 56.

preparatory work for Article 45 of Additional Protocol I, 'it would be unthinkable to require a prisoner, for example, in a case of urban resistance, to reveal the name of his commanding officer, and then the whole hierarchy of the organization to which he belongs, simply in order to furnish proof that he is entitled to the status of prisoner of war'.[73]

1131 It should be noted that, for Parties to Additional Protocol I, Article 45(2) of the Protocol provides that any person in the power of the enemy who is not held as a prisoner of war and is to be tried for an offence arising from the hostilities has the right to assert their entitlement to prisoner-of-war status before a judicial tribunal and have the matter freshly decided.[74] In this circumstance, the judicial tribunal involved must conduct both the status-determination proceedings and the criminal proceedings in accordance with the judicial guarantees provided for under humanitarian law, i.e. the Third Convention and other applicable law.

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[73] Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, para. 1733; *Official Records of the Diplomatic Conference of Geneva of 1974–1977*, Vol. XIV, p. 492.

[74] See also David, pp. 610–611. See also Australia, *Manual of the Law of Armed Conflict*, 2006, para. 10.17.

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